

1992

Stephen John Currier v. Tamara Holden : Brief of Appellant

Utah Court of Appeals

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David Bryant; Assistant Attorney General; Attorney For Respondent .

Stephen Currier; Attorney Pro Se.

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920467

IN THE UTAH COURT OF APPEALS

STEPHEN CURRIER

Petitioner/Appellant

vs.

TAMARA HOLDEN, Warden,

Respondent/Appellee.

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*

Case No. 920467- CA

Priority No. 2

BRIEF OF APPELLANT

Appeal from:

Seventh District Court, Carbon County

Case No. 92-95

Judge Boyd Bunnell

Attorney for
RESPONDENT/APPELLEE

David Bryant
Assistant Attorney General
Department of Corrections
6100 South 300 East
Murray, Utah 84107

Attorney Pro Se
PETITIONER/APPELLANT

Stephen Currier
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Utah State Prison
P.O. Box 250
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OCT 5 1992

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JURISDICTION

Jurisdiction for the Court of Appeals is conferred statutorily by U.C.A. 77-35-26 and Rule 26 Utah Rules of Criminal Procedure which gives the Utah Court of Appeals jurisdiction over appeals from final judgments in the Seventh Judicial District Court.

STATEMENT OF ISSUES

1. The issue before the court is whether error was committed by the District Court when it dismissed Petitioner's Petition for Writ of Habeas Corpus and Post Conviction Relief based upon the ninety day statute of limitations when there were extraordinary circumstances which prohibited the Petitioner from filing his petition within the ninety day statute of limitations.

Standard of Review: Correctness of the trial court's ruling, and no particular deference should be given to the court's conclusion. Henretty v. Manti City Corp., 791 P.2d 506 (Utah 1990), Scharf v. B.M.G. Corp., 700 P.2d 1068 (Utah 1985), Transamerica Cash Reserve v. Dixie Power, 789 P.2d 24 (Utah 1990), and Automotive Mfrs., etc. v. Serv. Auto Parts, Inc., 596 P.2d 1033 (Utah 1979).

2. Whether the ninety day statute of limitations for filing a Writ of Habeas Corpus is unconstitutional because it is a statute of limitations and not a procedural limitation.

Standard of Review: Correctness of the trial court's ruling, and no particular deference should be given to the court's conclusion. Henretty v. Manti City Corp., 791 P.2d 506 (Utah 1990), Scharf v. B.M.G. Corp., 700 P.2d 1068 (Utah 1985), Transamerica Cash Reserve v. Dixie Power, 789 P.2d 24 (Utah 1990), and Automotive Mfrs., etc. v. Serv. Auto Parts, Inc., 596 P.2d 1033 (Utah 1979).

**DETERMINATIVE CONSTITUTIONAL PROVISION, STATUTES
ORDINANCES AND RULES**

Utah Constitution, Article VIII, Section 4; (See Addendum E)

Utah Rules of Civil Procedure Rule 65B(b); (See Addendum F)

Utah Rules of Civil Procedure, 78-12-31.1, (See Addendum G)

STATEMENT OF CASE

The Appellant filed a Petition for Writ of Habeas Corpus and Post Conviction Relief on the 16th day of April, 1992. Assistant Attorney General, David Bryant, filed a Motion To Dismiss and Memorandum in Support of Motion To Dismiss the Petition for Writ of Habeas Corpus on the 30th day of April, 1992. The Motion To Dismiss was based upon the ninety day statute of limitations set forth in Utah Code Ann. 78-12-31.1, which bars any Petition for Writ of Habeas Corpus not filed within a ninety day period from the date that the cause of action accrued.

The Appellant filed a Motion For Extension of Time with the District Court on the 19th day of May, 1992. The District Court granted said extension on the 28th day of May, 1992.

The Appellant filed an Objection and Request For Hearing on the 5th day of June, 1992, wherein, he specifically stated why the Petition for Writ of Habeas Corpus and Post Conviction Relief should not be barred by the ninety day statute of limitations. The Memorandum in Response to the Petitioner's Objection was filed on the 10th day of June, 1992.

The District Court granted the Attorney General's Motion To Dismiss on the 12th day of June, 1992, and the final Order was entered therein on the 22nd day of June, 1992. The Appellant's Petition for Writ of Habeas Corpus and Post Conviction Relief was based upon the theory of ineffective assistance of counsel at the time of Petitioner's plea agreement in his criminal case and at the time of sentencing. The Appellant's Petition for Writ of Habeas Corpus was also based upon an affidavit which he had obtained from a co-defendant who had been an adverse witness against the Petitioner and for the state in his associated criminal prosecution. Said affidavit rescinded an incriminating statement which had been previously made by said co-defendant.

STATEMENT OF RELEVANT FACTS

Petitioner was charged with a First Degree Felony in 1989. As a result of wrongful and undue pressure on the part of Petitioner's defense counsel, Petitioner entered into a plea agreement whereby he plead guilty to a Second Degree Felony and another Misdemeanor charge was dropped. Subsequently, Petitioner brought two motions to withdraw his guilty plea, during which his counsel admitted that he had applied undue and wrongful pressure upon the Petitioner in order to convince him to plead guilty. The motions were denied. An Appeal was filed on the denial of the motions to withdraw his guilty plea. However, Petitioner was convinced by his counsel to withdraw the appeal based upon counsel's representing that if the Petitioner dropped the appeal and refrained from any legal action against his counsel, he would arrange for Petitioner's release from a term of six months in the county jail that he was serving pursuant to probation and suspended sentence. Petitioner was soon thereafter released from the county jail and remained on probation until such time as he tested positive for use of a controlled substance and his probation was then revoked. A significant factor in Petitioner's decision to plead guilty was the information that a co-defendant in the criminal matter had provided damaging testimony against the Petitioner.

On or about October 28, 1991, wherein, Mr. Marquez recanted

the damaging testimony he had previously given against the Petitioner. About two weeks later Petitioner received an affidavit which was signed by said co-defendant, Raymond Marquez. Petitioner soon thereafter met with the contract attorneys at the Utah State Prison to obtain assistance in filing a Petition for Writ of Habeas Corpus concerning the withdrawal of his guilty plea. On December 16, 1991, the contract attorneys received from the Petitioner an edited rough draft of his Habeas Corpus for revisions. Immediately thereafter Mr. Currier was transferred to the San Juan County Jail.

On or about January 6, 1992, the contract attorneys received from Mr. Currier a letter indicating that he had been transferred to the County Jail and on that same date a memo and revised Petition for Writ of Habeas Corpus along with the Petitioner's transcripts were sent to him at the San Juan County Jail. Accompanying said documents was a memo from the contract attorneys that stated that since he had been transferred to the San Juan County Jail, which was out of the contract attorneys jurisdiction, they were unable to help him with anymore services and he was advised to contact the contract attorney for that area. Upon arrival at the San Juan County Jail the Petitioner requested to see the San Juan County Jail contract attorney, but was not able to see him until approximately five weeks later.

On or about March 20, 1992, Mr. Currier was transferred back

to the Utah State Prison at which time he gave to the contract attorneys his Petition for Writ of Habeas Corpus and exhibits in order to file them with the court. On March 25, 1992, the original and three copies of Mr. Currier's Petition, Exhibits and accompanying documents were sent to him at the Utah State Prison for his signature and were subsequently filed on or about April 10, 1992.

SUMMARY OF ARGUMENT

- I. Utah's ninety day statute of limitations is unconstitutional because ninety days is not a reasonable period of time in which to file for relief.
- II. The ninety day statute of limitations is unconstitutional because it is a statute of limitations and not a procedural limitation.
- III. Utah's statute of limitations is unconstitutional because it contains no provision for excusable delay.

ARGUMENT

I

UTAH'S NINETY DAY STATUTE OF LIMITATIONS ON THE FILING OF A WRIT HABEAS CORPUS IS UNCONSTITUTIONAL

The Petitioner acknowledges that the state may apply procedural limitations on the filing of Petitions for Writs of Habeas Corpus. However, the Petitioner contends that, in order for that procedural limitation to be Constitutional, it must be

reasonable and that a ninety day statute of limitations is not reasonable. The Petitioner's only access to legal materials, while at the prison, is through the contract attorneys. Said contract attorneys have a limited contract which only enables them to assist the inmates in preparing their initial pleadings for Petitions for Writs of Habeas Corpus. Because the contract attorneys do not actually represent the inmates, it is often required that the inmate obtain his own documentation in order to prepare the Petition for Writ of Habeas Corpus. In the Petitioner's case, he had virtually no copies of any of his court file and consequently, was required to obtain documents, such as his commitment order and plea agreement, etc., through means such as writing letters to the court and contacting his case worker there at the prison. All of this took a considerable period of time which rendered virtually impossible the timely preparation of his Petition for Writ of Habeas Corpus. Also, the Petitioner had no legal training whatsoever. When he was transferred to the jurisdiction of another attorney and had difficulty contacting that attorney, he had no idea how to complete and file his Petition for Writ of Habeas Corpus within the ninety day period. Petitioner, being an inmate at the Utah State Prison, was precluded by policy and procedure of said prison from communicating directly with the co-defendant Marquez. Any such communication with said defendant needed to

occur through the intercession of third parties, which also took a considerable amount of time. The ninety days simply was not an adequate period of time in which the Petitioner could have filed his Petition for Writ of Habeas Corpus.

Utah's ninety day statute of limitations is the most restrictive in the nation. Many states do not even have a statute of limitation on Petitions for Writ of Habeas Corpus. Of those states which do have a statute of limitation on Petitions for Writs of Habeas Corpus, all of them well exceed ninety days. Idaho has a five year statute of limitation on Petitions for Writ of Habeas Corpus. Mellinger vs. State, 740 P.2d 73 (Idaho App. 1987); Housley vs. State, 811 P.2d 495 (Idaho App. 1991). Montana has a five year statute of limitation on Petitions for Writ of Habeas Corpus. State vs. Perry, 758 P.2d 268 (Mont. 1988). Colorado has a three year statute of limitations. People vs. Germany, 674 P.2d 345, 350, (Colo. 1983). Wyoming has a five year statute of limitations to bring an action under the post-conviction act. See Albert vs. State, 466 P.2d 826 (Wyo. 1970). Illinois has a five year statute of limitations. See People vs. Beamon, 333 N.E.2d 575 (Ill. App. 1975). Mississippi has a three year statute of limitations. Perkins vs. State, 487 So.2d 791 (Miss. 1986). Patterson vs. State, 594 So.2d 606 (Miss. 1992). Alabama has a two year statute of limitations. Dukes vs. State, 587 S.2d 1065

(Ala.Cr.App. 1991). Iowa has a two year statute of limitations on Petitions for Writs of Habeas Corpus. Davis vs. State, 443 N.W.2d 707 (Iowa 1989). Other than Utah, the most restrictive statute of limitations on a Petition for Writ of Habeas Corpus which the Petitioner could find is that of 120 days in the State of Oregon. See Bartz vs. State, 110 Or.App. 613, 825 P.2d 657, (Or. App. 1992). However, Petitioner is not aware of any Oregon Court dealing with the reasonableness of the 120 day period because that was not an issue which has come before it.

Some of the justices in the Utah Supreme Court believe that the ninety day statute of limitations on a Petition for Writ of Habeas Corpus is unconstitutional. In the concurring and dissenting opinion of Justice Zimmerman in Smith vs. Cook, 803 P.2d 788, 796 (Utah 1990), Justice Zimmerman stated as follows:

"I concur in the result in part I of the Chief Justice's opinion, because I do not think the legislature can validly impose a 3 month limitation on habeas corpus actions." See Utah Constitution Article I Section V(11); See also, Condermarin vs. University Hosp., 775 P.2d 348, 366-69 (Utah 1989), (Zimmerman, J., concurring in part); Berry vs. Beech Aircraft Corp., 717 P.2d 670, 675 (Utah 1985).

Justice Stewart, concurred in the concurring and dissenting opinion of Justice Zimmerman as well. It is also interesting to note that Chief Justice Howe who delivered the opinion in Smith vs. Cook, specifically stated that, "Since we have resolved this issue

on statutory grounds, we will not reach Smith's constitutional arguments". Smith vs. Cook, at 791. The Utah Legislature may impose a limitation on the filing of a Petition for Writ of Habeas Corpus, but in order for it to be constitutional and not impose on the Petitioner's protected Due Process rights it must be much more reasonable than ninety days.

II

THE NINETY DAY STATUTE OF LIMITATIONS IS UNCONSTITUTIONAL BECAUSE IT IS A STATUTE OF LIMITATIONS AND NOT A PROCEDURAL LIMITATION.

In State vs. Fowler, 752 P.2d 497 (Ariz.App. 1987), the Arizona Court of Appeals ruled that a one year statute of limitations imposed upon the commencement of a post conviction relief action was unconstitutional because it conflicted with the Arizona Supreme Court's power to make procedural rules which was vested in it by the Arizona Constitution. In that case the Arizona Rules of Criminal Procedure specifically stated that a Petition for Post Conviction Relief could be filed at any time, however, the Arizona Legislature passed a statute which stated that any post conviction relief petition must be filed within a one year period of time. In Arizona, as in Utah, the State Supreme Court is vested exclusively with the power to make procedural rules. Id. at 500. Consequently, any law which the Legislature enacts which infringes

upon the State Supreme Court's procedural powers is unconstitutional.

1. To Be Constitutional The Limitation Must Be Procedural In Nature.

In State vs. Fowler, Id., the court distinguished between a statute of limitations and a procedural limitation. The court pointed out that statute of limitations in the criminal context are considered acts of grace or a surrendering by the sovereign of its right to prosecute. State vs. Fowler, at 500. The court also explained that statute of limitations,

"...create a bar to prosecution and are therefore not merely statute of repose as they are in civil cases. A criminal statute of limitations is not a mere limitation upon the remedy but one upon the power of the sovereign to act against the accused."

State vs. Fowler, at 500.

Consequently, as pointed out by the Arizona Court of Appeals "in criminal law a statute of limitations deals only with the right to commence a criminal case. Time limits prescribed for steps to be taken subsequent to the commencement of a case are not statutes of limitations." State vs. Fowler, at 500. Such limitations are procedural in nature and are regulated by the courts, not the legislature.

2. The Utah Supreme Court Has Imposed No Procedural Limitation On The Filing Of A Petition For Writ Of Habeas Corpus.

In Utah, the rules of civil or criminal procedure do not specifically state a procedural limitation on the filing of a Petition for Writ of Habeas Corpus or for Post Conviction Relief. In Utah Rules of Civil Procedure Rule 65B(b), it states as follows:

(1) Any person imprisoned in the penitentiary or county jail under a commitment of any court whether such imprisonment be under an original commitment or under a commitment for violation of probation or parole, who asserts that in any proceedings which resulted in his commitment there was a substantial denial of his rights under the Constitution of the United States or of the State of Utah, or both, may institute a proceeding under this rule.

Such proceeding may be commenced by filing a complaint together with a copy thereof with the clerk of the court in which such relief is sought."

The Utah Supreme Court has not placed a procedural limitation on the filing of the Petitions for Writ of Habeas Corpus or Petitions for Post Conviction Relief.

The Utah Constitution specifically states in Article VIII, Section 4, as follows:

The Supreme Court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process.

Thus, if a procedural limitation of ninety days were to be

constitutionally imposed upon the filing of the Petition for Writ of Habeas Corpus, it would have to be done by the Utah Supreme Court and not by a Legislative enactment.

III

UTAH'S STATUTE OF LIMITATION IS UNCONSTITUTIONAL BECAUSE IT CONTAINS NO PROVISION FOR EXCUSABLE DELAY

In order for the Utah ninety day statute of limitations on the filing of a Petition For Writ of Habeas Corpus to be reasonable and thus, constitutional, it must contain provisions for relief from being time barred when evidence of excusable delay is presented. In Passainisi vs. Director, Nevada Department of Prisons, 769 P.2d 72, 74, (Nev. 1989), the court ruled that the Nevada statute of limitations was reasonable, "...especially because the requirement could be waived by showing a prejudice and good cause for failure to meet the one year time period." In Albert vs. State, 466 P.2d 826 (Wyo. 1970), where the state has a five year statute of limitations, the court looked at the issue of whether the Petitioner's missing of the deadline was due to his own neglect or excusable delay. It specifically found no evidence in the record tending to excuse the delay. In fact the Wyoming state statute containing the five year statute of limitations specifically states that the petitioner may obtain relief from the statute of limitations if he can show facts that indicate that the delay was

not due to his own neglect.

In People vs. Germany, 674 P.2d 345, 350 (Colo. 1983), Colorado held that its statute of limitation for collateral attack on criminal convictions violated due process by precluding challenges to convictions solely on the basis of a time bar without providing the defendant any opportunity to show justifiable excuse.

In Davis vs. State, 443 N.W.2d 707, 710, the Supreme Court of Iowa held that imposition of its statute of limitations was also subject to the right of the Petitioner to raise the issue of justifiable excuse for delay. Even in the more restrictive State of Oregon, the court specifically addresses the issue of whether or not the Petitioner presented any evidence of his failure to comply with the 120 day statute of limitations because he was prevented or dissuaded from examining the issues in the Petitioner's Petition for Writ of Habeas Corpus. See Bartz vs. State, 110 Or.App. 613, 825 P.2d 657 (Or.App. 1992).

In all of the states researched by Petitioner the petitioner has the right or the opportunity to raise the issue of whether or not his failure to comply with the statute of limitations was due to his own neglect or due to circumstances beyond his control. Since the Utah statute of limitations provides for no such exception to the filing of a Petition for Writ of Habeas Corpus, then it is an unreasonable violation of the Petitioner's Due

Process rights and is consequently unconstitutional.

The Petitioner in this case missed the statute of limitations nor filing his Petition for Writ of Habeas Corpus by only a few days. The reason for such failure was the fact that the Petitioner was not able to accumulate his evidence and prepare his Petition for Writ of Habeas Corpus within ninety days. Ninety days was simply too short a time for the Petitioner to prepare a Petition for Writ of Habeas Corpus due to the limited legal resources which were available to him in the prison.

CONCLUSIONS CONTAINING STATEMENT OF RELIEF SOUGHT

Because the Utah ninety day statute limitations on the filing of a Petition for Writ of Habeas Corpus or for Post Conviction Relief is so restrictive in nature it is unconstitutional. In order for a restriction on the time period for filing a Petition for Writ of Habeas Corpus or Post Conviction Relief to be limited such limitations must be a procedural limitation imposed by the Utah Supreme Court which is not the case in Utah. The ninety days permitted for filing Petitions for Writs of Habeas Corpus and for Post Conviction Relief by the statute of limitations is much too restrictive of period and is consequently unreasonable, and thereby, unconstitutional. In order for even a procedural limitation on the filing of Petition for Writ of Habeas Corpus or

Post Conviction Relief to be constitutional it must have some provision for excusable delay when the filing deadline has been missed.

For the above described reasons the Appellant respectfully request that the court rule that the ninety day statute of limitation found at Utah Code Ann. § 78-12-31.1 is unconstitutional and thus unenforceable, and to remand the Appellant's case to the District Court within instructions that Appellant's Petition for Writ of Habeas Corpus be heard.

Therefore, the Petitioner respectfully submits that the 90 day statute of limitations for the filing of a Petition for Writ of Habeas Corpus is unreasonable and therefore, unconstitutional and should be struck down.

DATED this 2nd day of OCT, 1992.

Stephen Currier
STEPHEN CURRIER
Attorney Pro Se

CERTIFICATE OF MAILING

I hereby certify that on the 5th day of OCT,
1992, I caused to be mailed, postage prepaid, four copies of the
foregoing BRIEF OF APPELLANT to the following:

David Bryant
Assistant Attorney General
Department of Corrections
6100 South 300 East
Murray, Utah 84107

Stephen Currier

ADDENDUM A

STEPHEN CURRIER
Attorney Pro Se
Utah State Prison
P.O. Box 250
Draper, Utah 84020

IN THE SEVENTH DISTRICT COURT, CARBON COUNTY
STATE OF UTAH

STEPHEN CURRIER,	*	
Petitioner,	*	PETITION FOR WRIT OF
	*	HABEAS CORPUS AND POST
vs.	*	CONVICTION RELIEF
	*	
TAMARA HOLDEN, Warden,	*	Case No. _____
Respondent.	*	Judge _____

COMES NOW the Petitioner, STEPHEN CURRIER, pursuant to the following Rule of Civil Procedure:

 X Rule 65B(b) since claim is based on original commitment, or
 Rule 65B(b) since claim is based on parole violation, or
 Rule 65B(b) since claim is based on probation violation, or
 Rule 65B(c) since claim is based on parole grant hearing,

and for cause of action alleges as follows:

1. Petitioner is being illegally restrained at the following location: Utah State Prison, P.O. Box 250, Draper, Utah 84020.

2. Petitioner was convicted and sentenced at the following Court: Seventh District Court, Carbon County, State of Utah.

The dates of the proceedings in which the conviction (or Board of Pardons decision) was entered are as follows: April 3, 1987

PETITION FOR WRIT OF HABEAS CORPUS AND POST CONVICTION RELIEF

The case number for these proceedings is: ___not known; X known
and is case number 2434.

3. In plain and concise terms, all of the facts on the basis of which the Petitioner claims a substantial violation of rights as the result of the commitment (or terms of parole) are as follows:

a. That petitioner had ineffective assistance of counsel in that petitioner's counsel used undue and wrongful pressure to have petitioner enter into a plea agreement and plead guilty to the charges against the petitioner. (See P.2 of Transcripts on Motion to Change Plea) Petitioner's attorney stated that the plea agreement petitioner was entering into was that the sentence of one year invoked on petitioner would be suspended, and that petitioner would receive 1 year unsupervised probation and that the petitioner could leave the state unsupervised. Counsel continued to tell petitioner that this agreement was the best he could get and that if petitioner went to trial then petitioner was looking at a term of 1-15 at the Utah State Prison. (See Copies of Transcripts on Motion To Change Plea). Petitioner requested different counsel but his counsel told petitioner that he could not have another attorney handle his case because there was one available to handle his case. Petitioner told counsel that he

PETITION FOR WRIT OF HABEAS CORPUS AND POST CONVICTION RELIEF

could not plead guilty to something he did not do. However, counsel kept repeating to petitioner that if he went to trial he would be sentenced to 1-15 years in prison. Petitioner finally had no choice but to accept the alleged plea agreement.

b. Petitioner had no preliminary hearing. If petitioner signed a waiver of preliminary hearing, he did not know what it was he was signing. Counsel did not explain it to him.

c. When the plea was submitted to the judge in open court the prosecutor said that no plea bargain agreement existed.

d. Because the prosecutor denied the existence of a plea bargain, petitioner requested that his guilty plea be withdrawn approximately two minutes after it was entered. The Judge refused to allow petitioner to withdraw the guilty plea.

e. That petitioner's counsel had a conflict of interest in that petitioner's counsel also represented Raymond C. Marquez in the case who made statements against the petitioner that effected the way the petitioner was defended. Petitioner was not aware of the conflict until after he had been sentenced. As a result of this conflict, petitioner's counsel was reluctant to try the case and adequately represent the petitioner.

f. Because petitioner had no preliminary hearing, petitioner's counsel failed to enter evidence of two witnesses'

PETITION FOR WRIT OF HABEAS CORPUS AND POST CONVICTION RELIEF

statements at the preliminary hearing. Petitioner was accused of sexual abuse of a child and his counsel did not investigate the hospital records of the alleged victims as to whether they were negative or positive until Mr. Currier told him to.

g. One of the witnesses that had given a statement to the police that petitioner had sex with both of the victims has now recanted his statement. (See Attached Affidavit of Raymond C. Marquez)

h. Petitioner is in possession of another affidavit which states that the alleged victim denied any such assault by petitioner. (See Affidavit of Michael Stansfield)

4. The judgment of conviction or the commitment for violation of probation or parole has been reviewed on appeal.

 X Yes The number and caption or title of the appellate proceeding and the results of the review are as follows:

That petitioner's counsel filed an appeal with the Court of Appeals and then told petitioner to sign an plea agreement to drop the appeal and not sue anyone including himself, and his counsel would get him released from the Carbon County Jail. Petitioner signed, the appeal was dismissed and petitioner was released into probation. He was later violated for dirty urines.

 No It was not appealed because _____

PETITION FOR WRIT OF HABEAS CORPUS AND POST CONVICTION RELIEF

9. Due to the continuing nature of the illegal restraint, the statute of limitations set forth in Utah Code Ann. §78-12-31.1 does not bar this action.

WHEREFORE, Petitioner prays that this Court:

1. Schedule an evidentiary hearing at which time Petitioner may be present and represented by counsel.

2. Permit Petitioner, who remains indigent, to proceed without prepayment of costs, fees or other assessments.

3. Grant Petitioner the authority to obtain subpoenas in Forma Pauperis, for witnesses and documents necessary to assist in the proof of the facts alleged in the petition as stated above.

4. Issue an Order for Post Conviction Relief to have the Petitioner brought before it, to the end that he may be discharged from the illegal and unconstitutional confinement and restraint.

Dated this _____ day of _____, 1992.



STEPHEN CURRIER
Attorney Pro Se

ADDENDUM B

FILE COPY

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Telephone: (801) 265-5638

IN THE SEVENTH JUDICIAL DISTRICT COURT, CARBON COUNTY
STATE OF UTAH

STEPHEN CURRIER,	:	
	:	MOTION TO DISMISS
Petitioner,	:	
v.	:	
TAMARA HOLDEN, Warden,	:	Case No. 92-85
Respondent.	:	Judge Boyd Bunnell

Respondent, by and through her counsel, David F. Bryant, Assistant Attorney General, hereby moves this court to dismiss Petitioner's petition for writ of habeas corpus because it is time-barred and raises claims which could and should have been raised on appeal.

DATED this 27th day of April, 1992.


DAVID F. BRYANT
Assistant Attorney General

MAILING CERTIFICATE

I hereby certify that on the 28th day of April, 1992, I caused to be mailed, postage prepaid, a copy of the foregoing to Stephen Carrier, pro se, P.O.Box 250, Draper, Utah 84020.

Margaret D. Peterson

ADDENDUM C

STEPHEN CURRIER
Attorney Pro Se
Utah State Prison
P.O. Box 250
Draper, Utah 84020



**IN THE SEVENTH DISTRICT COURT, CARBON COUNTY
STATE OF UTAH**

STEPHEN CURRIER
PETITIONER

vs.

TAMARA HOLDEN, WARDEN
RESPONDENT

OBJECTION

Case No. 92-95

Judge Boyd Bunnell

Petitioner, Stephen Currier, Attorney Pro Se, hereinafter known as petitioner, with his objection, to respondents' "Motion to Dismiss," and states as follows:

- agrees no basis*
1. Petitioner does have cognizable issues;
 2. In the interest of justice, petitioner believes that in this instant case, that, "Pro Se Habeas Corpus petitions should be liberally construed," as stated in, Wallace vs. Lockhart, 701 F.2d. 719 (8th Cir. 1982);
 3. Petitioner's petition should not be dismissed, as a dismissal is contrary to Utah Constitution, Article I, Section II, of which Utah Code Annotated, 78-12-31.1, attempts to supercede, which cannot stand, as can be seen in, Micheal O. Smith vs. Gerald Cook, Warden, Utah State Prison: David R. Wilkinson, Utah State Attorney General, Case No. 890241, filed November 29th, 1990, In THE SUPREME COURT OF THE STATE OF UTAH; of which also provides more than sufficient caselaw in support of the ruling.

4. In further support to continue this action, to present for a hearing, to determine the facts, a bar to dismissal is supported again, in the Utah Constitution, under Article I, Section 5, which simultaneously with the Utah Rules of Civil Procedure, Rule 65B (b), gives further, and original jurisdiction, not to suspend the privilege of Writ of Habeas Corpus..., in the instant case. *not suspend*
nothing there about it.

5. This court is bound under Article I, Section 3, of the Utah Constitution, in combination with Article VI, Section 2 of the United States Constitution.

6. Further, this court is bound by Article I, Section 9 (2), United States Constitution, whereby, "The privilege of the Writ of Habeas Corpus shall not be suspended...", which supercedes Utah Code Ann. 78-12-31.1, that David F. Bryant, Assistant Attorney General, for the State of Utah, should be well aware of.

7. Petitioner further claims protection, pursuant to the Fourteenth Amendment, U.S. Constitution, in the interest of justice, in barring Respondents' Motion to Dismiss. *How? Why? no arg.*

8. Under, Bounds vs. Smith, 97 S. Ct., at 1491, "Prisoners have the constitutional right of access to the courts.", and even if Utah Code Annotated, Statute 78-12-31.1, is not superceded, Petitioner is being incarcerated on an ongoing basis, and it would be a travesty of justice to make an innocent man continue to be incarcerated because of the technicality of a (90) ninety day statute of limitations. *in concerned arose from certain acts occurring on 30 days ago*

9. Petitioner has been transferred, repeatedly, from one facility to another, making it impossible to file within the time frame, which is supported by an affidavit from Wayne A. Freestone, Contract Attorney, for the Department of Corrections, attached and incorporated with this objection. *he has 3 yrs take*

10. Addressing the second point, in Respondents' Motion to Dismiss, in their memorandum, Petitioners' Attorney did not file an interlocutory appeal and then advised Petitioner to dismiss the appeal. *off covers only 5 months*

11. The dismissal, supra "10", was offered, under the Attorneys' advice as deal to get out of jail, under the provision that an agreement was signed.

12. The agreement, supra "11" was not to sue anyone, including the lawyer himself, and to dismiss the appeal.

13. Petitioners' Attorney was unethically involved with a conflict of interest in coercing Petitioner to sign the above mentioned agreement, as the lawyer was personally involved in protecting himself from being sued.

In the interest of justice, this court should investigate the circumstances of this instant action, take Petitioners' allegations as true, hold a hearing to determine the facts, and determine whether the plea bargain is valid-given to the entirety of circumstances, and also insure the protection of Petitioners' Constitutional Rights, under state and federal laws of this land.

Dated this 3rd day of June, 1992

Stephen Carrier
Stephen Carrier

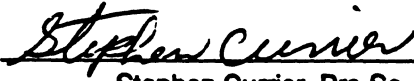
Medical Records.

- Garcia, J. F.

I, Stephen Currier, Pro Se, Petitioner, hereby certify that on 3rd day of June, 1992, I caused to be mailed, a true and correct copy of the foregoing OBJECTION, to:

Clerk of the Court-Carbon County
149 East 100 South
Price, Utah 84501

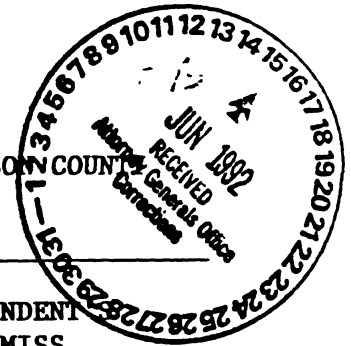
R. Paul Van Dam (3312)
Attorney General
David F. Bryant (5672)
Assistant Attorney General
State of Utah
Attorneys' for Respondent
300 East 6100 South, Suite 204
Murray, Utah 84107



Stephen Currier, Pro Se,
Petitioner

ADDENDUM D

IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR CARBON COUNTY
STATE OF UTAH



STEPHEN CURRIER,

Petitioner,

v.

TAMARA HOLDEN, Warden,

Respondent.

RULING ON RESPONDENT
MOTION TO DISMISS

Civil No. 92-85

The Respondent has filed a motion to dismiss this Petition on the ground that it was not timely filed in accordance with Section 78-12-31.1 of the Utah Code. The Plaintiff has objected to the Motion and has requested oral arguments.

From the file and the memorandum submitted, the Court finds that the Petition was not timely filed as required by the Rule, and that the Rule setting a time limitation on the filing of applications for writs of habeas corpus does not suspend the right under the Constitution, and that the Statute of Limitations as specified is not unconstitutional.

The Court Further finds that the constitutional issue has been authoritatively analyzed and ruled upon and therefore, the Court will deny the application for oral arguments.

THE COURT HEREBY grants the Motion to Dismiss on the ground that the Petition was not timely filed, and directs that the attorney for the Respondent prepare a formal order to that effect.

DATED this 12 day of June, 1992.

Boyd Bunnell
BOYD BUNNELL, District Judge

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I Mailed a true and correct copy of the foregoing RULING ON RESPONDENT'S MOTION TO DISMISS by depositing the same in the United States Mail, postage prepaid, to the following:

David F. Bryant
Assistant Attorney General
300 East 6100 South, Suite 204
Murray UT 84107

Stephen Currier
UTAH STATE PRISON
Post Office Box 250
Draper UT 84020

DATED this 12th day of June, 1992.


Secretary

ADDENDUM E

injunction may cause the party restrained or enjoined;

(3) The order or injunction, if issued, would not be adverse to the public interest; and

(4) There is a substantial likelihood that the applicant will prevail on the merits of the underlying claim, or the case presents serious issues on the merits which should be the subject of further litigation.

(f) Domestic relations cases.

Nothing in this rule shall be construed to limit the uitable powers of the courts in domestic relations cases.

mended effective September 1, 1991.)

Rule 65B. Extraordinary relief.

a) **Availability of remedy.** Where no other plain, speedy and adequate remedy is available, a person may petition the court for extraordinary relief on any of the grounds set forth in paragraph (b) (involving wrongful imprisonment), paragraph (c) (involving other types of wrongful restraint on personal liberty), paragraph (d) (involving the wrongful use of public or corporate authority) or paragraph (e) (involving the wrongful use of judicial authority and the failure to exercise such authority). There shall be no special form of writ. The procedures in this rule shall govern proceedings on all petitions for extraordinary relief.

to the extent that this rule does not provide special procedures, proceedings on petitions for extraordinary relief shall be governed by the procedures set forth elsewhere in these rules.

b) Wrongful imprisonment.

(1) **Scope.** Any person committed by a court to imprisonment in a state prison, other correctional facility or county jail who asserts that the commitment resulted from a substantial denial of rights may petition the court for relief under this paragraph. This paragraph (b) shall govern proceedings based on claims relating to original commitments and commitments for violation of probation or parole. This paragraph (b) shall not govern proceedings based on claims relating to the terms or conditions of confinement.

(2) **Commencement.** The proceeding shall be commenced by filing a petition, together with a copy thereof, with the clerk of the court in which the commitment leading to confinement was issued, except that the court may order a change of venue on motion of a party for the convenience of the parties or witnesses.

(3) **Contents of the petition.** The petition shall set forth all claims that the petitioner has in relation to the legality of the commitment. Additional claims relating to the legality of the commitment may not be raised in subsequent proceedings except for good cause shown. The petition shall state:

(i) the place where the petitioner is now

probation or parole has been reviewed on appeal, and, if so, the number and caption or title of the appellate proceeding and the results of the review;

(v) whether the legality of the commitment has already been adjudicated in any prior post-conviction or other civil proceeding, and if so the reasons for the denial of relief in the prior proceeding.

(4) **Attachments to the petition.** The petitioner shall attach to the petition affidavits, copies of records or other evidence available to the petitioner in support of the allegations. The petitioner shall also attach to the petition a copy of the pleadings filed by the petitioner in any prior post-conviction or other civil proceeding that adjudicated the legality of the commitment, and a copy of all orders and memoranda of the court. If copies of pertinent pleadings, orders, and memoranda are not attached, the petition shall state why they are not attached.

(5) **Memorandum of authorities.** The petitioner shall not set forth argument or citations or discuss authorities in the petition, but these may be set out in a separate memorandum, two copies of which shall be filed with the petition.

(6) **Assignment by the presiding judge.** On the filing of the petition, the clerk shall promptly deliver it to the presiding judge of the court in which it is filed. The presiding judge shall if possible assign the proceeding to the judge who issued the commitment.

(7) **Dismissal of frivolous claims.** On review of the petition, if it is apparent to the court that the issues presented in the petition have already been adjudicated in a prior proceeding, or if for any other reason any claim in the petition shall appear frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating that the claim is frivolous on its face. The order shall be sent by mail to the petitioner. Proceedings on the claim shall terminate with the entry of the order of dismissal. The order of dismissal need not recite findings of fact or conclusions of law.

(8) **Service of petitions.** If, on review of the petition, the court concludes that all or part of the petition is not frivolous on its face, the court shall designate the portions of the petition that are not frivolous and direct the clerk to serve a copy of the petition and a copy of any memorandum by mail upon the attorney general and the county attorney.

(9) **Responsive pleading.** Within twenty days (plus time allowed under these rules for service by mail) after service of a copy of the petition upon the attorney general and county attorney, or within such other period of time as the court may allow, the attorney general or county attorney

ADDENDUM F

shall have the effect of removing a justice from office. The chief justice shall be selected from among the justices of the Supreme Court as provided by statute. The chief justice may resign as chief justice without resigning from the Supreme Court. The Supreme Court by rule may sit and render final judgment either en banc or in divisions. The court shall not declare any law unconstitutional under this constitution or the Constitution of the United States, except in the concurrence of a majority of all justices of the Supreme Court. If a justice of the Supreme Court is disqualified or otherwise unable to participate in a cause before the court, the chief justice, or in the event the chief justice is disqualified or unable to participate, the remaining justices, shall call an active judge from an appellate court or the district court to participate in the cause. 1984

Sec. 3. [Jurisdiction of Supreme Court.]

The Supreme Court shall have original jurisdiction to issue all extraordinary writs and to answer questions of state law certified by a court of the United States. The Supreme Court shall have appellate jurisdiction over all other matters to be exercised as provided by statute, and power to issue all writs and orders necessary for the exercise of the Supreme Court's jurisdiction or the complete determination of any cause. 1984

Sec. 4. [Rule-making power of Supreme Court — Judges pro tempore — Regulation of practice of law.]

The Supreme Court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process. The Legislature may amend the Rules of Procedure and Evidence adopted by the Supreme Court upon a vote of two-thirds of all members of both houses of the Legislature. Except as otherwise provided by this constitution, the Supreme Court by rule may authorize retired justices and judges and judges pro tempore to perform any judicial duties. Judges pro tempore shall be citizens of the United States, Utah residents, and admitted to practice law in Utah. The Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law. 1984

Sec. 5. [Jurisdiction of district court and other courts — Right of appeal.]

The district court shall have original jurisdiction in all matters except as limited by this constitution or by statute, and power to issue all extraordinary writs. The district court shall have appellate jurisdiction as provided by statute. The jurisdiction of all other courts, both original and appellate, shall be provided by statute. Except for matters filed originally with the Supreme Court, there shall be in all cases an appeal of right from the court of original jurisdiction

Sec. 7. [Qualifications of justices and judges.]

Supreme Court justices shall be at least 30 years old, United States citizens, Utah residents for five years preceding selection, and admitted to practice law in Utah. Judges of other courts of record shall be at least 25 years old, United States citizens, Utah residents for three years preceding selection, and admitted to practice law in Utah. If geographic divisions are provided for any court, judges of that court shall reside in the geographic division for which they are selected. 1984

Sec. 8. [Vacancies — Nominating commissions — Senate approval.]

When a vacancy occurs in a court of record, the governor shall fill the vacancy by appointment from a list of at least three nominees certified to the governor by the Judicial Nominating Commission having authority over the vacancy. The governor shall fill the vacancy within 30 days after receiving the list of nominees. If the governor fails to fill the vacancy within the time prescribed, the chief justice of the Supreme Court shall within 20 days make the appointment from the list of nominees. The Legislature by statute shall provide for the nominating commissions' composition and procedures. No member of the Legislature may serve as a member of, nor may the Legislature appoint members to, any Judicial Nominating Commission. The Senate shall consider and render a decision on each judicial appointment within 30 days of the date of appointment. If necessary, the Senate shall convene itself in extraordinary session for the purpose of considering judicial appointments. The appointment shall be effective upon approval of a majority of all members of the Senate. If the Senate fails to approve the appointment, the office shall be considered vacant and a new nominating process shall commence. Selection of judges shall be based solely upon consideration of fitness for office without regard to any partisan political considerations. 1984

[Vacancies — Nominating commissions — Senate approval.] [Proposed.]

(1) When a vacancy occurs in a court of record, the governor shall fill the vacancy by appointment from a list of at least three nominees certified to the governor by the Judicial Nominating Commission having authority over the vacancy. The governor shall fill the vacancy within 30 days after receiving the list of nominees. If the governor fails to fill the vacancy within the time prescribed, the chief justice of the Supreme Court shall within 20 days make the appointment from the list of nominees.

(2) The Legislature by statute shall provide for the nominating commissions' composition and procedures. No member of the Legislature may serve as a member of, nor may the Legislature appoint members to, any Judicial Nominating Commission.

(3) The Senate shall consider and render a decision

ADDENDUM G

dertaking in a criminal action, for a forfeiture or penalty to the state.

(4) An action for libel, slander, assault, battery, false imprisonment, or seduction.

(5) An action against a sheriff or other officer for the escape of a prisoner arrested or imprisoned upon either civil or criminal process.

(6) An action against a municipal corporation for damages or injuries to property caused by a mob or riot.

(7) A claim for relief or a cause of action under the following sections of Title 25, Chapter 6, the Uniform Fraudulent Transfer Act:

(a) Subsection 25-6-5(1)(a), which in specific situations limits the time for action to four years, under Section 25-6-10; or

(b) Subsection 25-6-6(2). 1989

12-30. Actions on claims against county, city or town.

Actions on claims against a county, city or incorporated town, which have been rejected by the board of county commissioners, city commissioners, city council or board of trustees, as the case may be, must be commenced within one year after the first rejection thereof by such board of county or city commissioners, city council or board of trustees. 1953

12-31. Within six months.

Within six months:

In action against an officer, or an officer de facto:

(1) to recover any goods, wares, merchandise or other property seized by any such officer in his official capacity as tax collector, or to recover the price or value of any goods, wares, merchandise or other personal property so seized, or for damages for the seizure, detention, sale of, or injury to, any goods, wares, merchandise or other personal property seized, or for damages done to any person or property in making any such seizure.

(2) for money paid to any such officer under protest, or seized by such officer in his official capacity, as a collector of taxes, and which, it is claimed, ought to be refunded. 1953

12-31.1. Habeas corpus — Three months.

Within three months:

For relief pursuant to a writ of habeas corpus. This limitation shall apply not only as to grounds known to petitioner but also to grounds which in the exercise of reasonable diligence should have been known by petitioner or counsel for petitioner. 1979

12-31.2. Post-conviction remedies — 30 days.

Within 30 days:

No post-conviction remedies may be applied for or entertained by any court within 30 days prior to the date set for execution of a capital sentence, unless the grounds therefor are based on facts or

The limitations in this article apply to actions brought in the name of or for the benefit of the state or other governmental entity, the same as to actions by private parties, except under Section 78-12-33.5. 1988

78-12-33.5. Statute of limitations — Asbestos damages — Action by state or governmental entity.

(1) (a) No statute of limitations or repose may bar an action by the state or other governmental entity to recover damages from any manufacturer of any construction materials containing asbestos, when the action arises out of the manufacturer's providing the materials, directly or through other persons, to the state or other governmental entity or to a contractor on behalf of the state or other governmental entity.

(b) Subsection (a) provides for actions not yet barred, and also acts retroactively to permit actions under this section that are otherwise barred.

(2) As used in this section, "asbestos" means asbestiform varieties of:

(a) chrysotile (serpentine);

(b) crocidolite (riebeckite);

(c) amosite (cummingtonite-grunerite);

(d) anthophyllite;

(e) tremolite; or

(f) actinolite. 1988

78-12-34. Repealed.

1981

ARTICLE 3

MISCELLANEOUS PROVISIONS

78-12-35. Effect of absence from state.

Where a cause of action accrues against a person when he is out of the state, the action may be commenced within the term as limited by this chapter after his return to the state. If after a cause of action accrues he departs from the state, the time of his absence is not part of the time limited for the commencement of the action. 1987

78-12-36. Effect of disability.

If a person entitled to bring an action, other than for the recovery of real property, is at the time the cause of action accrued, either under the age of majority or mentally incompetent and without a legal guardian, the time of the disability is not a part of the time limited for the commencement of the action. 1987

78-12-37. Effect of death.

If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his representatives after the expiration of that time and within one year